# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 13, 2012 |
| v | No. 304161<br>Wayne Circuit Court |
| ATKINSON JACKSON, JR.,<br><br>Defendant-Appellant. | LC No. 10-010578-FH |

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Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for felon in possession of a firearm ("felon in possession"), MCL 750.224f, and possession of a firearm during the commission of a felony ("felony-firearm"), second offense, MCL 750.227b. The trial court sentenced defendant to a mandatory five-year prison term for the felony-firearm conviction, MCL 750.227b, and, as a fourth habitual offender, MCL 769.12, to three years' probation for the felon in possession conviction. We affirm.

Defendant first argues that he was denied due process when the trial court failed to recognize the affirmative defense of defense of another. We disagree. The availability of affirmative defenses for a statutory crime is a question of law that this Court reviews de novo. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). We accept the trial court's findings of fact unless they are clearly erroneous. *People v Reese*, 491 Mich 127, 159; 815 NW2d 85 (2012).

The record, read in context, reveals that the trial court understood defense counsel's argument, was aware of the defense, but was unpersuaded that defendant's actions amounted to defense of another. The record reads, in pertinent part:

> *Mr. Slameka (attorney for defendant)*: If I saw you being assaulted with [sic] a person who had a gun, and I took it away from that person so they couldn't assault you, and I'm turning around and the police come, I'm in possession of that gun. But Lord, I'm trying to help someone.
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> *The Court*: This situation is different, because the person has left the location where the immediate danger was, and is walking down the street.

*Mr. Slameka*: He's only three streets away.

*The Court*: Well, we don't know.

*Mr. Slameka*: He could have left it there so somebody else got it.

*The Court*: Right.

*The Court*: Right. So he does the right thing.

*The Court*: He could have stayed there and called the police to come and get the gun.

*Mr. Slameka*: Yeah; I can't deny that.

*The Court*: Well, this is unfortunate.

* * *

*Mr. Slameka*: [H]e has a [sic] temporary possession of a weapon that he extricated from some fool who was about to assault somebody.

And I understand what you're [the Judge] is saying, and I understand the prosecution's position. I really do. I'm not dumb.

But sometimes I would think there are sort of exceptions when you try to save somebody from being assaults [sic]. That's all I was trying to get across to you.

*The Court*: I wish there was an exception in this fact pattern, but there isn't; okay?

*Ms. Baker (for the People)*: My only rebuttal would be then that that's not a defense for this felony firearm.

*The Court*: No.

The foregoing demonstrates that the trial court listened to defense counsel's argument regarding "exceptions" to firearm possession offenses but ultimately concluded that there was no "exception in this fact pattern" because the facts indicated that defendant "left the location where the immediate danger was, and [was] walking down the street." In the absence of a clear indication that the trial court misunderstood the governing legal standard of defense of another, this Court will presume the trial court understood that law. See *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988). We therefore hold that the trial court did not deny defendant due process by failing to recognize an applicable affirmative defense.

Defendant also argues he was denied the right to effective assistance of counsel because defense counsel failed to raise the affirmative defense of defense of another. We disagree.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's factual findings for clear error, and its constitutional determinations de novo. *Id*. Because the trial court did not conduct an evidentiary hearing, this Court's review is limited to errors apparent on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Generally, to establish ineffective assistance of counsel, a defendant must satisfy the two-part test established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). First, defendant must show that his counsel's performance was deficient. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004). This requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland,* 466 US at 687. Second, defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. *Matuszak*, 263 Mich App at 57-58. There is a strong presumption that defense counsel rendered effective assistance. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). This Court "will not . . . use the benefit of hindsight when assessing counsel's competence." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defendant's ineffective assistance of counsel claim involves defense counsel's alleged failure to assert at trial the affirmative defense of defense of another. Failure to raise a valid affirmative defense when there is substantial evidence to support the defense may amount to ineffective assistance of counsel. See, e.g., *Pickens*, 446 Mich at 327 (alibi defense). "A defense is substantial if it might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

From our review of the record, defense counsel argued to the trial court that the facts of this case presented an "exception" to the firearm possession statute because defendant was saving someone from being assaulted. Defense counsel stated to the trial court:

> [H]e has a [sic] temporary possession of a weapon that he extricated from some fool who was about to assault somebody.
>
> And I understand what you're [the trial judge] is saying, and I understand the prosecution's position. I really do. I'm not dumb.
>
> But sometimes I would think there are sort of exceptions when you try to save somebody from being assaults [sic]. That's all I was trying to get across to you.

Defense counsel emphasized the mitigating circumstances of defendant's possession and attempted to persuade the judge that defendant's possession was justified. Though he never used the specific phrase, "defense of another," or referenced the statute itself, it is evident that the trial court understood defense counsel's argument and simply disagreed. Defendant cannot show that he was "prejudiced" since the trial court was ultimately unpersuaded that defendant's actions—

walking home with a handgun instead of calling police—amounted to defense of another in the situation of an assault. *Matuszak*, 263 Mich App at 57-58. Defendant's argument amounts to second-guessing defense counsel's performance and competence, something this Court will not do. *Odom*, 276 Mich App at 415. We therefore reject defendant's ineffective assistance of counsel claim.[1]

Defendant also argues he was denied due process when the trial court assessed court-appointed attorney's fees and costs against him without first conducting an ability-to-pay analysis. We disagree. This Court reviews questions of law de novo. *People v Jackson*, 483 Mich 271, 277; 769 NW2d 630 (2009).

In *Jackson*, our Supreme Court held, "The ability-to-pay assessment is only necessary when that imposition is enforced and the defendant contests his ability to pay." *Jackson*, 483 Mich at 298. Defendant's argument is limited to the trial court's initial assessment of fees and costs at sentencing; he does not contest his ability-to-pay at the present time.[2] His argument is therefore foreclosed by the Supreme Court's holding in *Jackson* that trial courts need not conduct an ability-to-pay analysis when imposing court-appointed attorney's fees. *Jackson*, 483 Mich at 298.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

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[1] Defendant raises other instances of ineffective assistance of counsel, including failure to fully investigate possible witnesses and failure to consult with defendant about possible plea deals. These claims stem from an affidavit by defendant, which was not referenced in defendant's motion for a new trial, and is therefore not part of the lower court record. "In the absence of an evidentiary record regarding defendant's claims, . . . [this Court is] unable to address counsel's alleged failures to investigate the case and discuss strategy with defendant." *People v Johnson*, 208 Mich App 137, 142; 526 NW2d 617 (1994).

[2] To the extent that defendant is arguing that the imposition of fees and costs presents an undue hardship at the present time, *Jackson* requires that defendant petition the trial court to reduce or eliminate the amount that the remittance order requires him to pay. *Jackson*, 483 Mich at 296. There is no evidence that defendant has done that.